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QUESTIONS PRESENTED

Whether the Board's *Station KKHI* rule, which for purposes of the good faith doubt test denies any probative weight to evidence that the employer has hired a new work force of permanent replacements and requires the employer to prove that the replacements were actually opposed to the Union, is arbitrary and capricious and is not rational.

Whether, as found by the Fifth Circuit, for purposes of the good faith doubt test, an employer may reasonably doubt that permanent replacements support the Union.

Whether the Board's decision that when CMS withdrew recognition, CMS lacked a reasonable good faith doubt concerning the Union's majority support among CMS's employees, is supported by substantial evidence in the record when considered as a whole.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1685

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CURTIN MATHESON SCIENTIFIC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

STATEMENT

Following a Board election on April 15, 1970, Teamsters Local 968 ("Union") was certified as the bargaining representative for a unit of warehouse employees of Respondent, Curtin Matheson Scientific, Inc. ("CMS" or "Company"). J.A. 8, 126-127 [Tr. 7, Tr. 7].[1] During the

1. All dates are 1979 unless otherwise stated. References to pages in the Joint Appendix are designated "J.A." Citations to exhibits are followed by two additional transcript references to the point of offer into evidence and acceptance by the ALJ, which will be placed in

following nine years, the Union and CMS entered into a series of collective bargaining agreements, the latest of which was a three-year contract that expired on May 21, 1979. J.A. 46, 75.

The parties commenced negotiations on May 2nd, and in a meeting on May 25th, CMS made its best offer to the Union. J.A. 79, 134-135 [Tr. 7, Tr. 7]. The Union rejected the offer on May 29th. J.A. 79, 135 [Tr. 7, Tr. 7]. CMS attempted to break the stalemate on June 4th by effecting a lockout, the legality of which the Board stipulated. J.A. 21; Pet. App. at 48. During the lockout (as well as the early part of the strike that followed) CMS operated the warehouse using its managerial and professional employees. J.A. 26, 57.

At a meeting with the Union on June 12th, CMS terminated the lockout and renewed its May 25th offer. J.A. 79, 134-135 [Tr. 7, Tr. 7]. Once again, however, the Union rejected the offer, choosing instead to commence a strike the following day, June 13th. J.A. 21, 79, 135 [Tr. 7, Tr. 7].

Five bargaining unit employees, who were not members of the Union, immediately crossed the picket line and reported to work. J.A. 47; Pet. App. at 27a. Two of these crossovers volunteered to CMS management their strong disapproval of the strike and the Union. J.A. 26-29, 135. Moreover, during the course of the strike, several other unit employees, including the current Chief Shop Steward and negotiating committee member, Shady Goodson, and

brackets. *e.g.* J.A. 100 [51, 51]. When reference is made to portions of the hearing transcript that were not included in the Joint Appendix, the page references will be preceded by "Tr." All exhibits in the Joint Appendix pages 112-137 (inclusive) were offered and admitted at page 7 of the hearing transcript. Reference to exhibits that are not included in the Joint Appendix will be designated "General Counsel's Exhibit" or "Respondent's Exhibit."

the former Shop Steward, J. R. Blackshire, crossed the picket line and informed CMS that neither they nor the unit employees wanted to participate in the strike, and that they no longer supported the Union. J.A. 29-30, 31-33, 144, 145 [85, 147].

According to Goodson, the strike had been called contrary to the wishes of the employees, in order *to satisfy a personal vendetta of Union Business Agent, Howard Reed,* who had been assigned to the CMS contract during 1977 and subsequently acted as the Union's Chief Spokesperson during the 1979 contract negotiations.[2] J.A. 145 [85, Tr. 147].

On June 25th CMS hired twenty-nine replacements.[3]

2. Administrative Law Judge Bennett, (hereinafter "ALJ") specifically found that Shady Goodson reported to CMS spokesperson and Director of Employee Relations, Elizabeth Price, that "the employees felt the strike was based on the hostility of the Union's Business Agent, Howard Reed." Pet. App. at 52a & n.7. *Compare* Pet. App. at 28a ("only the Union wanted the strike").

3. The Board's Brief suggests that CMS's decision to hire 29 replacements for 22 strikers was suspicious. Brief for Petitioner at 21 n.10. It was neither alleged nor argued, however, that the hiring of 29 replacements was improper. Indeed, it was acknowledged by the ALJ that this level of hiring was "understandable," and the Board, in its decision, did not voice disagreement. Pet. App. at 30a, 50a. CMS proved to be correct in anticipating immediate turnover. By July 20th, the number of replacements had dwindled to 25. J.A. 62. And on closer examination, it appears that CMS's decision to hire 29 replacements reflected sound business judgment. In this regard, CMS's lockout strategy, which was designed to cause the Union to accept the May 25th offer, was unsuccessful. During the lockout, CMS used its managerial and professional employees to perform the work of the bargaining unit. J.A. 26, 57. Once the lockout ended and the strike commenced on June 13th, *only five* bargaining unit employees reported to work. J.A. 47-50, 135. Thus, even after the lockout, the strike was very successful, leaving CMS in an extremely vulnerable position. Given the effectiveness of the strike and the obvious need to return the professional and managerial employees to their normal duties, CMS's decision to hire a sufficient number of new employees to allow for inefficiency and turnover was certainly

J.A. 61, 135. Elizabeth Price personally told each replacement that he or she was a "permanent replacement." J.A. 103-104. After they were hired, the permanent replacements had to cross a hostile picket line to report for work. J.A. 135.

During the three weeks that followed the hiring of the replacements, there was no communication between the Union and CMS. J.A. 136. Moreover, from June 25th until July 20th, the date upon which CMS withdrew recognition, the Union made no attempt to contact any of the permanent replacements. Pet. App. 30a. The Union's lack of interest in the replacements was mirrored by the replacements' lack of interest in the Union in that no evidence suggests that the permanent replacements ever attempted to contact the Union.[4]

By June 28th, the three men who represented the present and immediate past Union leadership from among the bargaining unit employees had either openly repudiated the Union, abandoned the strike, or both. J.A. 34-35.

By July 19th, four strikers, including Chief Steward Shady Goodson, announced their decisions to withdraw from the Union, to resign, or to retire. J.A. 144, 147. Along with these announcements came statements from

"understandable." Pet. App. at 50a. Moreover, had CMS's motives for hiring the replacements been insincere, it could have withdrawn recognition from the Union when the number of replacements was at its greatest, but it did not.

4. In its Brief *amicus curiae* at 18, the AFL-CIO laments that the replacements "in all probability" will know little and will be told nothing by the employer about the "circumstances that gave rise to the strike." Of course, the union can undertake to explain these issues to the replacements orally and in writing as they come and go daily across the union's picket line. But given the inherent conflict between the union and the replacements and the "hostility" that is typical of such daily confrontations (J.A. 135), an effort by the union to open such a dialogue with the replacements would be futile.

two of the four that their decisions were motivated by their dissatisfaction with the Union. J.A. 27-28, 149 [142, 147].

On July 16th, the Union sent two telegrams to CMS: the first requested reinstatement on behalf of all striking employees. Pet. App. at 29a; General Counsel's Exhibit 13 [Tr. 185, Tr. 186]; the second advised of the acceptance of CMS's May 25th offer. J.A. 128. Three days later, on July 19th, replacement worker Tim Hartman voluntarily reported to Price that he had heard a rumor that the replacements were to be laid off so that the strikers could return to their former positions. J.A. 98-99, 165 [Tr. 166, Tr. 166].

On July 20th, CMS informed the Union that it doubted the Union's majority, withdrew recognition, and invited the Union to file a petition for an election if the Union believed it had majority support. J.A. 130.

Significantly, none of CMS's actions, other than its withdrawal of recognition and subsequent refusal to bargain with the Union, was alleged to have been unlawful.[5]

5. It is not surprising that the evidence in the record may be incomplete on points now deemed relevant by the Board. Because the events giving rise to CMS's decision to withdraw recognition from the Union occurred more than a decade ago, particular attention must be paid to the dates upon which important Board and court pronouncements occurred, so that knowledge concerning such pronouncements is not unfairly imputed to CMS. Most significant among these is the Board's decision in *Station KKHI*. The Board's General Counsel tried this case under the now-discredited *Penasco* presumption; *i.e.*, "the replacements are presumed to support the union in the same ratio as did the former employees." J.A. 93. Even *Station KKHI* was tried on that theory. Pet. App. at 86a. Consequently, the Board *sua sponte* adopted the no-presumption rule, which was neither advocated nor opposed by the General Counsel, CMS or any other party.

SUMMARY OF ARGUMENT

The question presented to this Court is not whether the Board may refuse to apply any presumption regarding the extent of union support among permanent replacements, but whether the Board's no-presumption approach is consistent with the National Labor Relations Act. The practical effect of the Board's no-presumption rule is to obligate an employer to recognize as the exclusive bargaining representative a union whom a majority of employees have never expressed a willingness to accept. This new Board approach thus is irrational because it measures the quantum of proof necessary to satisfy the Board's own good faith doubt standard without appropriately giving probative weight to the fact that a company has hired an entirely new work force of permanent replacements.

I. The Board's no-presumption approach adopted in *Station KKHI*, Pet. App. 62a, and applied in this case is irrational for at least three reasons. First, the Board's inability to determine the union sentiments of permanent replacements is inconsistent with industrial realities. The Board itself long has recognized that permanent replacements who cross the picket line to take jobs vacated by strikers would not support the incumbent union. In this regard, the interests of economic strikers and replacements are diametrically opposed, with the union's loyalty lying with the strikers. Likewise, the replacements, recognizing the instability of their job tenure and the union's adverse interests, would not choose the union as their representative.

Second, the Board's no-presumption approach departs significantly from this Court's precedent which recognizes that for purposes of collective bargaining, replacement

workers do not support the union and should not be counted toward the union's majority. *See, e.g., NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1949). Moreover, the Board wholly has failed to articulate any rational basis for its departure from this established principle.

Third, the Board's no-presumption approach is inconsistent with the legislative history of the National Labor Relations Act. While the policy considerations differed under the Taft-Hartley Act of 1947 and the Labor-Management Reporting and Disclosure Act, Congress nevertheless contemplated that permanent replacements would not support the incumbent union. The Board has failed to reconcile its no-presumption approach with this explicit congressional recognition.

II. For at least four decades the Board has recognized that to justify withdrawal of recognition from an incumbent union following the certification year, an employer need only demonstrate a reasonably-based *good faith doubt* that the union enjoys majority support. In recent years, however, the Board has demonstrated a drastic departure from its own articulated policy. Since its *Station KKHI* decision, the Board has not once found the good faith doubt standard satisfied in cases involving striker replacements. In fact, it now appears that an employer must satisfy the more onerous burden of proving minority-in-fact, even if a good faith doubt has been established.

Indeed, as one court recently noted, there is now "little difference between the evidence necessary to prove a union's minority in fact and the employer's reasonable good faith doubt." *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297 (9th Cir. 1984). The Board's own

Brief in this case states that "[o]nly by demonstrating that the replacements are actually opposed to the union may an employer carry his burden of proving a good faith doubt of majority status." Brief for Petitioner at 20. Not only has the Board failed to articulate reasons for its departure from the good faith doubt standard, but it disingenuously pays lip service to a policy that it has, in effect, abandoned. Such a departure is arbitrary as a matter of law. *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade,* 412 U.S. 800, 808 (1973). Under a proper application of the good faith doubt test, there is sufficient evidence in this record upon which CMS reasonably based such a doubt. The Board's decision to the contrary is, therefore, not supported by substantial evidence in the record as a whole.

III. The Board's policy arguments in support of its no-presumption rule are fallacious and should be rejected. Contrary to the Board's assertions, a presumption that replacements do not support the incumbent union would not necessarily result in a loss of the bargaining representative. If an employer establishes a good faith doubt, a union may easily invoke the Board's election process, which has been characterized by the Board as the "most satisfactory" means to determine a union's majority. *Stoner Rubber Co.,* 123 N.L.R.B. 1440, 1445 (1959). If the union remains the majority choice of the employees, the employer is obligated to recognize the bargaining agent, and the Board's doomsday scenario is averted; if the union is in fact no longer the choice of a majority of the employees, then the employer properly and in good faith has refused to bargain with the minority. This result is entirely consistent with the National Labor Relations Act.

ARGUMENT

I.

The Board's No-Presumption Rule For Assessing Union Support Among Permanent Replacements Lacks Rationality And Is Inconsistent With The National Labor Relations Act

The only factually compelling view about permanent replacements' union sentiments, which is consistent with the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (1947) ("NLRA" or the "Act") and is supported by the decisions of this Court and the Board itself, is the traditional Board approach that permanent replacements do not support the union and that replacements should not be counted toward a union majority. *See* R. Gorman, *Labor Law* 112 (1976).[6] Congress, the courts, employers, organized labor, and the Board all have recognized that it is reasonable to assume that permanent replacements do not support the very union that seeks their ouster.

A. The Board's Traditional Recognition That Permanent Replacements Oppose The Incumbent Union Accurately Reflects The Actualities Of Industrial Relations.

The Board long has recognized that permanent re-

6. Professor Gorman did not state this proposition in terms of a "presumption." Rather, he stated the proposition in terms of an "assumption," which is precisely the language used in *Stoner Rubber Co.*, 123 N.L.R.B. 1440, 1444 (1959). Moreover, while the Fifth Circuit's decision referred to Professor Gorman's statement as the "Gorman Presumption," the court's holding was consistent with the Board's historical treatment of permanent replacements: "We hold that the Company was justified in doubting that the striker replacements supported the Union in this context." Pet. App. at 10a.

placements who cross a picket line to assume jobs vacated by strikers would not support an incumbent union. *See, e.g., Celanese Corp. of Am.*, 95 N.L.R.B. 664, 674 (1951) (108 replacements contributed to doubt); *Stoner Rubber Co.*, 123 N.L.R.B. at 1444 ("nor was it unreasonable to assume that none of the 18 permanent replacements were union adherents"); *Jackson Mfg. Co.*, 129 N.L.R.B. 460, 478 (1960) ("it is doubtful that the Union represented anything near a majority of the employees, unless it could be shown (as it was not) that the replacements hired during the strike had chosen the Union to represent it — *a most improbable situation*") (footnote omitted) (emphasis added); *Titan Metal Mfg. Co.*, 135 N.L.R.B. 196, 215 (1962); *S & M Mfg. Co.*, 172 N.L.R.B. 1008, 1008-1009 (1968) ("newly hired employees who had crossed the picket line to go to work . . . cannot be found [to be] union adherents"); *Beacon Upholstery Co.*, 226 N.L.R.B. 1360, 1368 (1976).[7]

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7. Various courts of appeals have also followed these holdings. *NLRB v. Randle-Eastern Ambulance Serv., Inc.*, 584 F.2d 720, 728 (5th Cir. 1978) (it is generally assumed that replacements do not support the union and ought not to be counted toward a union majority); *National Car Rental Sys., Car Rental Div. v. NLRB*, 594 F.2d 1203, 1207 (8th Cir. 1979) (permanent replacements assumed not to support the union and ought not to be counted toward a union majority); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1110 (1st Cir. 1981) (replacements are assumed not to support the union); *Whisper Soft Mills v. NLRB*, 754 F.2d 1381, 1388 (9th Cir. 1984) (citing *Randle-Eastern* with approval regarding assumption that replacements do not support union); *see also Phillip Carey Mfg. v. NLRB*, 331 F.2d 720, 734 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964) ("In light of the large number of strikers who were permanently replaced, there would be substantial ground for doubt concerning the union's majority status."); *NLRB v. Alva Allen Indus.*, 369 F.2d 310, 316 (8th Cir. 1966) (assumption that replacements do not favor the union's representation leaves the union's majority status "open to fair doubt").

The foregoing cases (the "*Celanese/Stoner* line of cases"), which span twenty-five years, are based on the Board's recognition that it is reasonable to assume that replacements do not support the union.[8] The holding in these cases is that an employer may reasonably doubt that replacements support the union, and the effect of the holding is that replacements are not counted toward the union's majority. Moreover, in all of the above cases, except *Titan*, there were no *additional findings* such as picket line violence or demands for the ouster of the replacements, that accounted for the Board's treatment of such evidence.

The basis for the Board's traditional approach, which recognizes that permanent replacements oppose the incumbent union, is found in the "actualities of industrial relations." *NLRB v. United Steelworkers*, 357 U.S. 357, 362-364 (1958). Since its very creation, the Board has acknowledged that the interests of the economic strikers and the replacement workers are "diametrically opposed." *A. Sartorius & Co.*, 10 N.L.R.B. 493, 494 (1938); *Beacon Upholstery Co.*, 226 N.L.R.B. at 1368. As be-

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8. In *Station KKHI*, the Board overruled its line of cases, which held that replacements were presumed to support an incumbent union in the same proportion as the strikers. Pet. App. 62a-63a. In so doing, the Board in *Station KKHI* and *CMS* cited several cases from the *Celanese/Stoner* line of cases (Pet. App. 63a-70a), but mischaracterized their import. Rather than supporting the Board's contention that, prior to 1975 it had not engaged in presumptions regarding the union sentiments of permanent replacements, the *Celanese/Stoner* line of cases, for twenty-five years, assumed that replacements were not union adherents, and held that employers could doubt that the replacements supported the union. The Board's failure to reconcile its new "no-presumption" rule with the *Celanese/Stoner* line of cases is arbitrary and renders the Board's *Station KKHI* and *CMS* decisions entitled to no deference. *See, e.g., Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973); *United Food and Commercial Workers Int'l Union v. NLRB*, 880 F.2d 1422, 1437 (D.C. Cir. 1989).

tween these two groups, the union's loyalty during a strike *always* lies on the side of the economic strikers. *See* Brief for Petitioners at n.9; *Station KKHI*, Pet. App. at 75a; Estreicher, *Strikers and Replacements*, 38 Lab. L. J. 287, 294 (1987) ("we know that in virtually *all cases* the union is not seeking to accomodate the rights of conflicting groups of workers but is acting out of an understandable, but *unremitting hostility* to the replacements") (emphasis added). Replacement workers, cognizant of their own job instability and the union's allegiance to the strikers, would, therefore, not support the incumbent union.

1. An Inherent Conflict Of Interest Exists Between The Incumbent Union And The Permanent Replacements.

From a striking union's standpoint, replacement workers who cross a picket line are seen as aligning themselves with management and against the union.[9] In union parlance, they are "scabs," a term that this Court has recognized as an "insult or epithet" reflecting the deep hostility between strikers and employees not supporting the union. *See Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 283 (1974). Indeed, much of the picket line violence over the years has been "a product of, or response to, the hiring of replacement workers." Estreicher, *Strikers and Replacements*, 3 Lab. Law. 897 (1987). Organized labor has thus sought congressional assistance prohibiting employers' use of permanent replacements,[10] and has initiated various lobbying drives in support of enactment of state anti-replacement statutes.[11]

9. For example, in its *amicus* brief submitted to the Court in *Belknap, Inc. v. Hale*, the AFL-CIO acknowledged: "Viewing this falling out between an employer and individuals who had been allied with the employer in combatting a strike, and noticing immediately that the sole apparent effect of the decision below is to penalize an employer who hired permanent strike replacements, our instinctive reaction is to say, a 'plague o' both your houses.'" *Brief of the AFL-CIO as Amicus Curiae in support of Petitioner* at 1, *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) (No. 81-1966). As noted by the Court, the AFL-CIO also disavowed the contention that the union acted as representative of the replacements in negotiating the strike settlement. *Belknap*, 463 U.S. at 507 n.10.

Conversely, permanent replacements understand that their interests are antithetical to those of the strikers and the incumbent union. Just as it was in 1938, Judge Learned Hand's observation is true today: "most men [and women] taking jobs so made vacant [by strikers], realize from the outset how tenuous is their hold." *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 871 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938). Although referred to as "permanent replacements," these workers realize from the beginning that they are in fact "non-permanent to the extent that a union may 'win' a strike

10. Before the House Labor Subcommittee on Labor-Management Relations, Richard L. Trumka, President of the United Mine Workers of America, urged Congress to amend the NLRA in order to prohibit "the hiring of permanent strike replacements." *Oversight Hearings on the Subject "Has Labor Law Failed" Before the Subcomm. on Labor-Management Relations of the Comm. on Education and Labor, 98th Cong., 2d Sess. 11 (1984)*. Likewise, James M. Kane, General President of the United Electrical, Radio and Machine Workers of America testified that "[e]conomic strikers should have the unrestricted right to return to their jobs at the end of a strike." *Id.* at 106.

11. Organized labor has succeeded in having a majority of states pass various "Strikebreaking Acts," which usually include one or more of the following provisions: "(a) restrictions on advertising for replacements, (b) prohibition of the use of 'professional strikebreakers,' (c) restrictions on the use of employment agencies to recruit replacements, and (d) restrictions on importation of replacements." Note, *Replacing Mackay: Strikebreaking Acts and Other Assaults on the Permanent Replacement Doctrine*, 36 Rutgers L. Rev. 861, 862 (1984). For a list of statutes and discussion of same, *see id.* at n. 11.

and force an employer to agree to a settlement that requires the reinstatement of striking employees." *Belknap, Inc. v. Hale,* 463 U.S. 491, 541-542 (Brennan, J., dissenting); *see also Station KKHI,* Pet. App. at 75a; *Leveld Wholesale, Inc.,* 218 N.L.R.B. 1344, 1350 (1975) ("[s]trike replacements can *reasonably foresee* that, if the union is successful, the strikers will return to work and the strike replacements will be out of a job") (emphasis added).

The interests of the striking union and those of the replacements are thus in direct conflict. It is a "legitimate bargaining demand," and indeed the union's primary goal "to get all the strikers back to work in preference to the replacements." *Belknap, Inc. v. Hale,* 463 U.S. 491, 532 (1983) (Brennan, J., dissenting) (citing *Portland Stereotypers' Union, No. 48 (Journal Publishing Co.),* 137 N.L.R.B. 782, 786 & n.6 (1962)); *see also Brief of AFL-CIO as Amicus Curiae in support of Petitioner* at 13 n.4, *Belknap, Inc. v. Hale* (No. 81-1966) ("It is common experience that unions seek to secure the reinstatement of *all* strikers") (emphasis added). Likewise, the overriding "concern" of the permanent replacements is "that in order to end the strike, the employer will agree with the union to reinstate the strikers at the replacements' expense." *Belknap,* 463 U.S. at 514, n.1 (Blackmun, J., concurring); *see also, Retail Clerks, Int'l Ass'n v. Lion Dry Goods, Inc.,* 369 U.S. 17, 28 (1962) (a strike settlement agreement "effect[s] the end of picketing . . . and restore[s] strikers to their jobs"). The replacement workers recognize that the union does not even have to "win" the strike in order for them to lose their jobs. Under many circumstances, the employer and the union may reach a back-to-work agreement that displaces the newly hired permanent re-

placements, or the "employer may unilaterally decide to permit such displacement." *TWA v. Independent Fed'n of Flight Attendants,* 109 S. Ct. 1225, 1233 (1989).

Consequently, it is reasonable to assume that the incumbent union would *not* be the choice of the replacements to serve as their bargaining representative. Just as "it is not logical to expect [a striking union] 'to negotiate in the best interests of permanent replacements' . . ." due to the "inherent conflict" between them, *Service Elec. Co.,* 281 N.L.R.B. 633, 639, 641 (1986) (quoting, *Leveld Wholesale,* 218 N.L.R.B. 1344-1350 (1975)), it is even less likely that replacement workers, cognizant of their tenuous job security and the union's adverse position, would accept the incumbent union to represent their interests.[12] *See* Flynn, *The Economic Strike Bar: Looking Beyond The "Union Sentiments" Of Permanent Replacements,* 61 Temp. L. Rev. 691, 705 (1988) (knowing that the

12. Moreover, the Board repeatedly has held that employers have no obligation to bargain with a striking union "concerning the continued employment terms of [striker] replacements." *Service Electric Co.,* 281 N.L.R.B. 633, 642 (1986); *see also Schmidt-Taigo Constr. Co.,* 286 N.L.R.B. No. 31 (Sept. 30, 1987); *Marbro Co.,* 284 N.L.R.B. No. 129, at 2 (July 24, 1987). The Board recognized that because of the "inherent conflict" between the interests of the permanent replacements and the striking union, the latter is unable "to bargain simultaneously in the best interest of both strikers and their replacements." *Service Electric Co.,* 281 N.L.R.B. at 641; *see also Leveld Wholesale,* 218 N.L.R.B. at 1350. In *Station KKHI,* however, the Board applies a wholly inconsistent principle and reaches the opposite result: it refuses to recognize that striker replacements evidence their rejection and repudiation of the union by crossing a picket line. This inconsistency between *Service Electric* and the decision below cannot be reconciled, and is arbitrary as a matter of law. *See, e.g., Atchinson, T. & S.F. Ry. v. Wichita Bd. of Trade,* 412 U.S. 800, 808 (1973); *United Food & Commercial Workers Int'l Union v. NLRB,* 888 F.2d 1422, 1437 (D.C. Cir., 1989) (reversing Board for its "failure to explain how it could reconcile the results that it approved in this case with the results contained in [other] Board decisions").

union may well be negotiating for their ouster, replacements are likely to oppose the union out of the simple desire to hold onto their positions). To believe otherwise would be to suggest that the chickens would favor the guardianship of the foxes.[13]

2. The Board's "No-Presumption Rule" Is Inconsistent With Prior Precedent And Is Not Factually Compelling.

The Board acknowledges that the "permanent replacements are typically aware of the Union's primary concern for the striker's welfare, rather than that of the replacements" and "indeed may be attempting to secure [the replacements'] discharge" and that "the replacements' attitude towards union representation may be influenced by this awareness. . . ." *Station KKHI*, Pet. App. at 75a; Brief for Petitioner at 18 n.9. Despite this recognition, the Board now contends that it is unable to discern *any* generalization about the union sentiments of the replacement workers. Brief of Petitioner at 16-17.[14]

13. In its *Belknap amicus curiae* brief, the AFL-CIO concedes the proposition that the striking union becomes more accommodative to the interests of the replacements in negotiating a strike settlement is at best "unrealistic" and the retention of any replacements simply represents "the maximum concession that the union was able to obtain from the employer." *Brief of the AFL-CIO as Amicus Curiae in support of Petitioner* at 13 n.4.

14. The Board's contention that *Station KKHI* creates a "no presumption" rule is disingenuous. Under *Station KKHI*, the Board includes replacements, strikers, and crossovers in the "expanded unit" and counts all such employees as union supporters until proven otherwise. Pet. App. at 6a, 31a n.10, 34a (only six out of fifty employees shown to oppose the union). As the Fifth Circuit observed, the Board in *Station KKHI* applied the general presumption of continuing majority with the same effect as the discredited *Pennco* presumption. Pet. App. 9a. CMS contends that the *Station KKHI* rule suffers from the same defects as the *Pennco* presumption and, as applied in this case, does not satisfy this Court's requirements for a valid presumption. *NLRB v. Baptist Hosp.*, 422 U.S. 773, 787 (1979).

Although purportedly based on a review of its past decisions[15] and an assessment of its experience, the Board fails to make any reference to the apparent changes in the attitudes of permanent replacements that would support what it presently sees to be the substantial possibility that such workers may desire representation from the very union that seeks their ouster.

The Board cites no support for its newly-adopted "no-presumption" rule. The Board relies on cases that relate to *strikers* who have abandoned the strike and crossed the picket line to return to work. *See, e.g., NLRB v. Granite State Joint Bd., Textile Workers Union of Am.*, 409 U.S. 213, 215 (1972) (employees who have resigned from the union and crossed the picket line); *TWA*, 109 S. Ct. at 1233 (employer not required to displace crossovers with more senior strikers). Unlike permanent replacements, crossovers merely are returning to their own jobs, not taking the jobs of strikers. Moreover, these returning strikers

15. In *Station KKHI*, Pet. App. at 75a n. 38, the only "past decisions" cited by the Board in support of its proposition that "the hiring of permanent replacements who cross a picket line, in itself, does not support the inference that the replacements repudiate the union as [their] collective bargaining representative" were *NLRB v. Frick Co.*, 423 F.2d 1327 (3d Cir. 1970) and *Rogers Mfg. v. NLRB*, 486 F.2d 644 (6th Cir. 1973), *cert. denied*, 416 U.S. 937 (1974). Both cases are inapplicable to the stated proposition. In *Frick*, the Third Circuit Court of Appeals held that "it was proper for the Board to rule that the Company is precluded from relying on the number of replacements hired during an *unfair labor practice strike* as evidence rebutting the presumption of continuing majority status." *NLRB v. Frick Co.*, 423 F.2d at 1334 (emphasis added). Similarly, the Sixth Circuit held that "the Company's engagement in *unfair labor practices* during the strike . . . casts a shadow on allegations of good faith." *Rogers Mfg. v. NLRB*, 486 F.2d at 647 (emphasis added). Unlike the *economic strikes* in *Station KKHI* and here, the strikers in an unfair labor practice strike are entitled to reinstatement to their former jobs, and their replacements are, as a matter of law, only temporary.

previously have accepted the union as their exclusive bargaining representative by working under the union's bargaining agency during conditions of industrial peace. Thus, even though crossovers may abandon a strike, the Board maintains that such action does not support a presumption that the crossovers repudiate the union as their *chosen* bargaining representative. *See, e.g., Celanese,* 95 N.L.R.B. at 674; *NLRB v. Pennco,* 684 F.2d 340, 342 (6th Cir.), *cert. denied,* 459 U.S. 994 (1982).

As opposed to crossovers, permanent replacements never have indicated any acceptance of the incumbent union as their bargaining representative. From the outset, replacement workers take jobs of the strikers and assume positions diametrically opposed to the union, the strikers, and their collective bargaining goals.

The Board's only justification that permanent replacements may support the incumbent union is its reference to the hypothetical replacement who "may be forced to work for financial reasons . . . but still desire[s] union representation. . . ." *Station KKHI,* Pet. App. at 75a. What the Board fails to recognize, however, is that the very reason the replacement worker crosses the picket line (i.e., to obtain employment) is the same reason that he or she will not support the union whose primary goal is to secure his or her discharge. Assuming, *arguendo,* that when an employer withdraws recognition some of the replacement workers may desire collective bargaining, it is simply inconceivable that they would choose *the incumbent* union as their representative.[16]

16. Footnote 17 of Brief for Petitioner sets forth a list of issues that a union may pursue after the strike has been terminated. The Board's concern that the strikers will not be represented, ignores the fact that the Act protects the interests of the strikers, and the union can police compliance with the Act by filing unfair labor practice charges as occurred in the cases cited by the Board in n.17. But the more important point is that the interests of the replacements *continue* to be *diametrically opposed* to those of the strikers, to whom the union owes its primary allegiance, even after the strike is ended. *See, e.g., TWA,* 109 S. Ct. 1225 (1989). Because the replacements *categorically* hold inferior seniority to the strikers, disputes concerning the strikers' rights to promotional opportunities, job and shift preference will continue to be a source of division between the groups. Indeed, post-strike arbitration cases concerning *contractual* claims of strikers to jobs, promotions, shifts and other benefits achieved by replacements during the strike are commonplace. *See, e.g., Wilson & Co.,* 34 Lab. Arb. (BNA) 125 (1960) (Perry, Weinstein, Arb.); *Dynamic Mfrs.,* 36 Lab. Arb. (BNA) 635 (1960) (Crane, Arb.); *Florida East Coast Ry.,* 41 Lab. Arb. (BNA) 1001 (1963) (Platt, Bok, Guthrie, Arb.); *Tarcon, Inc.,* 64 Lab. Arb. (BNA) 955 (1975) (Williams, Arb.); *Kimberly-Clark Corp.,* 83 Lab. Arb. (BNA) 1094 (1984) (Weiss, Arb.).

Consequently, despite its contention that its empirical judgments are entitled to deference, the Board has failed to provide any evidence, empirical or otherwise, to support its adoption of the "no-presumption" rule. This rule is, in effect, "no more than a fiction of rationalization, unsupported in Board law, or any law." *Stoner Rubber Co.,* 123 N.L.R.B. at 1450.[17] The Board must do more than merely cite "past decisions" inconsistent with the proposition it is propounding and must do more than state that it has "as-

17. Although the Board contends that there is no "empirical evidence" to support the presumption that permanent replacements do not support the incumbent union, a recent article, Montgomery, *The Influence of Attitudes and Normative Pressures on Voting Decisions in a Union Certification Election,* 42 Indus. & Lab. Rel. Rev. 262 (1989), states that there is a correlation between experience with unions and the way a person votes in a Board election. *Id.* at 277. This empirical finding supports an inference that the replacements hired by CMS would not view favorably representation by the Union, because (i) Howard Reed called the strike against the wishes of the bargaining unit employees based on his personal vendetta and (ii) as a consequence of this unwarranted and unwanted strike, all of the strikers lost their jobs. In a damaging admission, the Board appears to recognize this principle: "the post-strike union cannot be certain whether it will command sufficient support to continue as the exclusive representative." Brief for Petitioner at 22.

sessed [its] experience" without referencing a single incident in its fifty-year history in which the permanent replacements desired representation from the incumbent union. Pet. App. at 74a. The Board is obligated to articulate the evidence upon which it relies before imposing a bargaining agent on a majority of employees who never have accepted the union as their representative and whose interests are in direct conflict therewith. *See NLRB v. A.P.W. Prods.*, 316 F.2d 899, 906 n.2 (2d Cir. 1963).

B. The Board's Treatment Of Permanent Replacements Is Inconsistent With Decisions Of This Court.

In 1939, this Court decided *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), in which the employer lawfully discharged certain "sit-down" strikers. Thereafter, new employees were hired to replace them. *Id.* at 249. Reversing the Board's finding that the employer was obligated to continue to bargain with the union, this Court stated:

> In view of the change in the situation by reason of the valid discharge of the "sit-down" strikers and the filling of the positions with new men, we see no basis for a conclusion that after the resumption of work Lodge 66 was the choice of a majority of respondent's employees for the purpose of collective bargaining.

Id. at 261-262; *see also NLRB v. Ohio Calcium Co.*, 133 F.2d 721, 728 (6th Cir. 1943); *Fort Smith Chair Co.*, 143 N.L.R.B. 514, 520 (1963); *Beacon Upholstery Co.*, 226 N.L.R.B. 1360 at 1368 (after lawful discharge of strikers, the unit consisted of 10 replacements and 3 nonstrikers; therefore, the employer "had a reasonably

based doubt that the Union continued to represent a majority of the employees in the bargaining unit"). These holdings recognize that replacements for discharged strikers do not support the incumbent union, and therefore should not be counted toward the union's majority.

Similarly, in *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272 (1972), this Court held that, in successorship situations, when the successor's work force consists in majority part of former employees of the predecessor, the successor is obligated to bargain with the union that represented the predecessor's employees. *Id.* at 278-279. The Court said "*it would be different* if Burns had not hired employees already represented by a union certified as a bargaining agent, and the Board recognized as much at oral argument." *Id.* at 280-81 (emphasis added) (footnote omitted).[18]

Fifteen years later, in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987), this Court reaffirmed *Burns*. The dissent stated:

> This means that unless a majority of the new company's workers had been employed by the former company, there is no justification for assuming that the new employees wished to be represented by the former union, or by any union at all. *Spruce Up Corp.*, 209 N.L.R.B. 194. *Indeed, the rule hardly*

18. In response to the Court's question whether a majority of the successor's employees must have been represented by the bargaining agent, the Board stated "I wouldn't say that it has to be a majority, I think it has to be a substantial number. It has to be enough to give you a continuity of employment conditions in the bargaining unit." *Burns*, 406 U.S. at 281, n.6 (citation omitted). Thus, it would appear that the Board's willingness to sacrifice the will of the majority in the name of stability in bargaining relationships was manifested in its initial approach to the successorship question, just as it is in cases in which an employer hires a new work force to replace economic strikers.

> *could be otherwise. It would be contrary to the basic principles of the NLRA simply to presume in these cases that a majority of workers supports a union when more than half of them have never been members, and when there has been no election.*

Id. at 59-60 (Powell, J., dissenting) (citations omitted) (emphasis added).[19]

When viewed from the standpoint of the group of new employees, who either replace the predecessor's employees (the successorship case) or replace the economic strikers, the question is whether there is a valid basis for assuming that the different groups are likely to view differently representation by the incumbent union. Neither group has previously been affiliated with or endorsed representation by the union, and in the case of the replacements, they have entered the employment relationship under terms of extreme hostility toward the incumbent union. Therefore, there is a *greater reason* for inferring that permanent replacements are likely to oppose representation by the incumbent union and ought not to be counted toward its majority.

C. The Board's No-Presumption Rule Is Inconsistent With The Legislative History Of Section 9(c)(3) Of The NLRA.

The Taft-Hartley Act of 1947, by the addition of § 9(c)(3), denied permanently replaced economic strikers the right to vote in a union representation election. 29 U.S.C. § 159(c)(3) (1947). Twelve years later,

19. *Spruce Up Corp.*, 209 N.L.R.B. 194, *enforced*, 529 F.2d 516 (4th Cir. 1974), cited in the *Fall River* quote above, involved both successorship and permanent replacements. The clear implication of the *Spruce Up* holding is that permanent replacements should not be counted toward the union's majority. *Id.* at 195-196.

Congress amended § 9(c)(3) when it passed the Labor-Management Reporting and Disclosure Act ("LMRDA"). Under the amended Act, permanently replaced strikers were once again eligible to vote in a representation election, but only for a period of one year.

Although § 9(c)(3), as amended, primarily addresses the eligibility of strikers and their replacements to vote in a representation election, the Board has recognized that this "provision [is] pertinent . . . in determining whether an employer has a reasonable basis for questioning an incumbent union's presumed majority status, since the ultimate basis for the employer's asserted doubt here is that a majority of the employees in the *unit* are not union adherents." *C. H. Guenther & Son,* 174 N.L.R.B. 1202, 1203 (1969), *enforced,* 474 F.2d 983 (5th Cir. 1970). While policy considerations differed under Taft-Hartley and the LMRDA, Congress, nevertheless, explicitly contemplated that permanent replacements would not support the incumbent union.

In 1947, legislation introduced in the Senate (S. 1126) and the House (H.R. 3020) would have denied the right to vote in representation elections to strikers who had been permanently replaced. The opposition to both bills recognized that allowing permanent replacements to vote in a representation election to the exclusion of strikers would result in the ouster of the union. The Senate Minority Report on S. 1126 observed that "the strikers who normally would constitute the bulk of the union's adherents could not vote, [and] the *defeat of the bargaining agent is thus assured.*" S. Rep. No. 105, Pt. 2, 80th Cong., 1st Sess. 10 (1947) (emphasis added).[20] Similarly, the

20. The late Representative Claude Pepper, while serving in the Senate, was most vehement in his opposition to this aspect of S. 1126, concluding that "the old union would be broken, the collect[ive]

House Minority Report objected to H.R. 3020 as being anti-union:

> Thus, even if a labor organization goes on strike because of disagreement as to the terms or conditions of employment, the strikers cease to be employees if, while they are engaged in such strike they are replaced. . . . Since they would thereafter no longer be 'employees', their strike becomes illegal. *For the union that called them out would no longer represent a majority of the 'employees';* as it could no longer claim bargaining rights, its members would be striking for an illegal purpose from that moment forward.

H. Rep. No. 245, 80th Cong., 1st Sess. 95 (1947) (emphasis added).

In order to repeal what was seen as the undesirable consequence of the Taft-Hartley Act, Senator Kennedy of Massachusetts introduced S. 1555 on March 25, 1959. Senator Kennedy recognized:

> The difficulty which this amendment is designed to rectify occurs when employees go on strike, and the company undertakes to employ replacements, and is able to resume normal production, by using a number of new employees, as well as certain of the returning strikers. Under such circumstances the union is virtually deprived of any bargaining power; *and if a representation election is held the*

bargaining agent would be repudiated, *because the new workers would repudiate the old bargaining agent with which it had never had any connection, ...*" 93 Cong. Rec. S4321 (daily ed. Apr. 29, 1947), *reprinted in 2 NLRB, Leg. Hist. of the LMRA* at 1103 (emphasis added); *see also* 93 Cong. Rec. S1893 (daily ed. March 10, 1947) (statement of Sen. Morse), *reprinted in 2 NLRB, Leg. Hist. of the LMRA* at 956 ("[t]he strikebreakers are now the only employees of the employer . . . . *The union no longer represents a majority of the employees*").

> *union loses, because it is not likely that the replacement workers will vote for the union.*

105 Cong. Rec. S5746 (daily ed. Apr. 21, 1959) (emphasis added). Similarly, Senator Goldwater noted that S1555: "would effectively inhibit the employer from precipitating a strike for the purpose of replacing the strikers, calling for an NLRB election in which the *replacements vote against the union, and thus getting rid of the union.*" 105 Cong. Rec. S9118 (daily ed. June 8, 1959) (emphasis added).

The Conference Committee ultimately produced the present-day version of § 9(c)(3). While granting both the replaced economic strikers and their replacements the opportunity to vote on representation, the former group's right is limited to a period of one year after commencement of the strike. Representative Roosevelt voiced organized labor's concern that this compromise bill was still insufficient: "it would be to the advantage of a struck employer not to seek an election, following the hiring of strikebreakers, but rather to wait out the year, *form a company union with the strikebreakers, and then demand an election which would result in decertification of the union whose members are on strike.*" 105 Cong. Rec. H.16,644 (daily ed. Sept. 4, 1959) (emphasis added).[21]

21. Organized labor's feelings about § 9(c)(3) have not changed. As Bernard Jolles, Counsel, Western Counsel of Lumber, Production & Industrial Workers, United Brotherhood of Carpenters & Joiners of America, AFL-CIO recently stated: "In many instances, even if no decertification petition has been filed, the employer himself can file a petition for an election, claiming that he has a good faith doubt as to the continued majority status of the union. This precipitates an election, and again the *strikebreakers vote out the union.*" *Oversight Hearings on the Subject "Has Labor Law Failed" Before the Subcomm. on Labor-Management Relations of the Comm. on Education and Labor,* 98th Cong., 2d Sess. 134-135 (1984) (emphasis added).

Thus, the Board has failed to reconcile its no-presumption approach with Congress' explicit recognition that replacement workers would reject representation by the incumbent union.

II.

The Board's Decision Is Arbitrary And Capricious Because The Board No Longer Adheres To Its Own Articulated Standard For Evaluating The Propriety Of An Employer's Withdrawal Of Recognition

In 1951, the Board developed the now well-established principles for determining the lawfulness of an employer's withdrawal of union recognition following the certification year.[22] The Board's decision in *Celanese*, 95 N.L.R.B. at 664, established that an employer may rebut the presumption of continuing majority and lawfully withdraw recognition from an incumbent union if it can demonstrate *either* (1) that the union has, in fact, lost

22. Despite the challenges by the AFL-CIO as *amicus curiae* in support of Petitioner, these governing principles are well settled. The good faith doubt defense has long been applied by the Board, *Atlanta Journal Co.*, 82 N.L.R.B. 832 (1949), *enforced*, 187 F.2d 13 (5th Cir. 1951); *Celanese*, 95 N.L.R.B. at 664, and adopted without exception by the courts of appeal. *See, e.g., Briggs Plumbingware, Inc. v. NLRB*, 877 F.2d 1282, 1288 (6th Cir. 1989); *Bickerstaff Clay Prods. Co. v. NLRB*, 871 F.2d 980, 984 (11th Cir. 1989); *Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1173 (3d Cir. 1989); *United Supermarkets, Inc. v. NLRB*, 862 F.2d 549, 552 (5th Cir. 1989); *Bryan Memorial Hosp. v. NLRB*, 814 F.2d 1259, 1262 (8th Cir. 1987). Although this Court never has explicitly addressed the validity of the good faith doubt test, the Court has cited the *Celanese* case with approval. *See Brooks v. NLRB*, 348 U.S. 96, 101 (1954); *Burns*, 406 U.S. at 272 n.3 (1972); *Fall River*, 482 U.S. at 41, n.8. The Board has recognized as much. *Stoner Rubber Co.*, 123 N.L.R.B. 1440, 1444 n.9 (1959); *Station KKHI*, Pet. App. at 61a. The Board has not repudiated this rule and neither have the courts. This Court, therefore, need not direct the abandonment of these long-standing principles that have governed labor-management relations for the past four decades.

its majority support (the "minority-in-fact test"), or (2) that the employer has a good faith doubt, based on objective considerations, concerning the union's continuing majority (the "good faith doubt test"). The Board itself has recently reiterated that these two tests are different: "[t]he first method deals with *establishing a fact*, whereas the second method pertains to *'a sufficient objective basis for a reasonable doubt.'* " *J & J Drainage Prods. Co.*, 269 N.L.R.B. 1163, 1171 (1984) (emphasis added). Thus, to justify withdrawal of recognition, an employer need not conclusively demonstrate that a majority of its employees no longer desire to be represented by the union. *Bickerstaff Clay Prods. Co. v. NLRB*, 871 F.2d 980, 985 (11th Cir. 1989); *Randle-Eastern*, 584 F.2d at 729; *NLRB v. Anvil Prods.*, 496 F.2d 94, 96 (5th Cir. 1974). Indeed, in *Bartenders, Hotel, Motel & Restaurant Employers Bargaining Ass'n*, 213 N.L.R.B. 651, 654 n.21 (1974), the Board reiterated its allegiance to the good faith doubt test and restated its long-accepted principle that an employer may withdraw recognition *"if the employer can prove reasonably grounded doubt of that status based on objective considerations free of unfair labor practices."* (emphasis added). *See also Automated Business Sys.*, 205 N.L.R.B. 532, 535 (1973).

Despite its professed adherence to the good faith doubt standard, in recent years the Board has been loath to find that an employer's withdrawal of union recognition was based on an asserted good faith doubt of union majority support. In this case, for example, the Board trivialized the Company's evidence, evaluated each asserted factor in isolation, and gave no probative effect to the hiring of permanent replacements. In essence, the Board has hidden the fact that it has changed the rules applicable

to withdrawal of recognition. Such an unarticulated departure from its stated policy must not be countenanced.

A. It Is A Well-Accepted Principle That An Employer Need Not Prove Minority-In-Fact To Justify Withdrawal Of Union Recognition, But May Rely On A Reasonably Based Good Faith Doubt That The Union Enjoys Majority Support.

A careful reading of the Board's decision in *Celanese* discloses the critical principle upon which the good faith doubt standard is based: the quantum of proof necessary to rebut the presumption of continuing majority varies depending on the test relied upon by the employer (i.e., minority-in-fact test or good faith doubt test). A comparison of the majority opinion and the dissent in *Celanese* vividly illustrates this point. The dissent advanced the argument that the presumption could not be rebutted on a mere showing of good faith doubt, but insisted that the presumption of continuing majority could be rebutted *only* if the employer offered *competent evidence* that the bargaining representative was, in fact, no longer the majority choice of the employees in the bargaining unit. *Celanese,* 95 N.L.R.B. at 676.

The dissent based its argument upon several grounds. First, it reasoned that it was incorrect from an evidentiary standpoint to permit a presumption to be defeated by evidence supporting a good faith doubt. Rather, the dissent would have required evidence "that the Union *in fact* did not represent the majority of the employees" before the presumption could be rebutted. *Id.* at 675 (emphasis in original). The dissent quarreled with the majority's "legal reasoning" and concluded that "[c]ertainly it does not follow from the fact that one has the right to *rebut*

a presumption by showing that a different status obtains, that it is sufficient to overcome the presumed status to show that one has good faith doubts as to the truth of the presumption." *Id.* at 675. Second, the dissent argued that it was for the Board, and not the employer, to determine whether the circumstances relied upon have rebutted the presumption. Thus, it reasoned that the good faith of the employer in challenging the union's majority was reasoned to be "immaterial." *Id.* at 676. Finally, the dissent concluded that the good faith doubt test adopted by the majority "will encourage annual challenges to majority status and tend to disrupt bargaining stability." *Id.* at 677.

In stark contrast, the majority concluded that "the employer can, without violating the Act, refuse to bargain with a union on the ground that it doubts the union's majority, *provided* that the doubt is in *good faith.*" *Id.* at 672 (footnote omitted) (emphasis in original). The majority recognized that evidence insufficient to rebut the presumption in a technical sense may nonetheless justify withdrawal of recognition:

> [U]nless we are to hold, with our dissenting colleagues, that a good faith doubt of majority cannot be urged as a defense even after the certificate year we do not reach the issue of the *fact* of majority, and are thus *not concerned with whether the presumption created by the certificate was rebutted by competent evidence,* until we first ascertained whether the doubt of majority was raised in good faith.

Id. at 672 n.16 (emphasis added). *See also Automated Business Sys.,* 205 N.L.R.B. at 535; *Retired Persons Pharmacy,* 210 N.L.R.B. 443, 445-446 (1974), *enforced,* 519 F.2d 486 (2d Cir. 1975) (stating that

"competent evidence" is not required). After holding that the employer was free to decline to bargain with the union if its doubt as to the union's majority was raised in good faith, the Board clarified the meaning of the test: the doubt must be based on "reasonable grounds for believing that the union had lost its majority status" (the "reasonableness" factor) and the question of majority support must not have been raised in the context of illegal anti-union activities (the "good faith" factor). *Id.* at 673.

B. Despite The Acceptance Of The Good Faith Doubt Defense, The Board's Practice Indicates That It Impermissibly Has Departed From Its Own Policy.

In *Station KKHI* the Board resurrected the evidentiary and policy arguments relied upon by the dissent in *Celanese* and, *sub silentio,* reversed *Celanese.* The Board in *Station KKHI* reasoned that the "presumption of continuing majority" requires an employer to come forward with "objective evidence that the representative the employees have designated *no longer enjoys majority support.*" *Station KKHI,* Pet. App. at 62a (emphasis added). Indeed, in *CMS,* the Board held "we conclude that the evidence is insufficient *to rebut the presumption of the Union's continuing majority,*" rather than making a finding as to CMS's good faith doubt. *Id.* Pet. App. at 35a (emphasis added). The Board thus ignored the teaching of *Celanese* that "competent evidence," such as that sufficient to rebut the presumption of continuing majority support is *not* necessary to establish good faith doubt. *Celanese,* 95 N.L.R.B. at 674. As such, the Board accords no weight to an employer's evidence that replacements were hired, unless the evidence is sufficient to create a *presumption* that permanent replacements are *not* union adherents. The related requirement that an em-

ployer's proof must be competent to rebut the presumption of continuing majority has the same effect. Both of these requirements demand proof that the replacements, *in fact, are opposed to the union.*

The Board's Brief confirms that *Station KKHI* has departed from the good faith doubt standard: *"[o]nly by demonstrating that the replacements are actually opposed to the union may an employer carry his burden of proving a good-faith doubt of majority status."* Brief for Petitioner at 20 (emphasis added). Indeed, the Board's abhorrence of the good faith doubt standard pervades its Brief. For example, the Board's stated reason for rejecting the Gorman presumption is that "by relieving the employer of the burden of coming forth with evidence that the striker replacements *actually oppose the union,* the Gorman presumption would make it easier for an employer to justify a withdrawal of recognition." Brief for Petitioner at 21 (emphasis added). Thus, the Board's current application of the good faith doubt standard is in conflict with the holding in *Celanese* that proof by competent evidence of minority-in-fact is not required to justify withdrawal of recognition.

Following the *Station KKHI* decision, the *only* proof that the Board has accepted as satisfying the good faith doubt standard is actual proof of minority-in-fact, thus indicating that the Board has merged its dual standard for evaluating employer withdrawal of recognition. It appears that the only cases finding that an employer sustained its burden of establishing good faith doubt since *Station KKHI* are: *Bil-Mar Foods, Inc.,* 286 N.L.R.B. No. 84 (Nov. 4, 1987) (authenticated petition signatures indicating that a majority of employees rejected the union); *Airport Aviation Serv.,*

Inc., 292 N.L.R.B. No. 87 (Jan. 31, 1989) (petition indicating majority of employees rejected the union and second petition to de-authorize dues check-off); *Atwood & Morrill Co.*, 289 N.L.R.B. No. 100 (July 12, 1988) (clear and unambiguous evidence that the union had lost majority support); *Paper Bd. Cores, Inc.*, 292 N.L.R.B. No. 107 (Feb. 10, 1989) (decertification petition signed by exactly fifty percent of employees).

Even under the most compelling facts, the Board has rejected good faith doubt claims.[23] In *Bickerstaff Clay Prods. Co.*, 286 N.L.R.B. No. 27 (Sept. 30, 1987), *enforcement denied*, 871 F.2d 980 (11th Cir. 1988), for example, the Board rejected the company's asserted good faith doubt even though the employer hired significant numbers of permanent replacements, there was violence associated with the strike, there was significant breakdown in union leadership, a reduction in union activity, and a clear record of employee dissatisfaction with the union's representation. Finding that this decision

23. Since the Board's *Station KTHI* decision, the Board has not once found the good faith doubt standard satisfied in cases involving striker replacements. *Accurate Die Casting Co.*, 292 N.L.R.B. No. 106 (Feb. 10, 1989); *Bickerstaff*, 286 N.L.R.B. No. 27 (Sept. 30, 1987), *enforcement denied*, 871 F.2d 980 (11th Cir. 1989); *Christopher St. Owners Corp.*, 286 N.L.R.B. No. 22 (Sept. 30, 1987); *Cook Bros.*, 288 N.L.R.B. No. 46 (April 8, 1988); *Curtin Matheson Scientific, Inc.*, 287 N.L.R.B. No. 35 (Dec. 16, 1987), *enforcement denied*, 859 F.2d 362 (5th Cir. 1988), *cert. granted*, 109 S. Ct. 3212 (1989); *Dold Foods, Inc.*, 289 N.L.R.B. No. 156 (July 28, 1988); *Glover Bottled Gas Corp.*, 292 N.L.R.B. No. 99 (Feb. 8, 1989); *Hajoca Corp.*, 291 N.L.R.B. No. 16 (Sept. 30, 1988), *enforced*, 872 F.2d 1169 (3d Cir. 1989); *Johns-Manville Sales Corp.*, 289 N.L.R.B. No. 40 (June 27, 1988); *Proxy Communications*, 290 N.L.R.B. No. 68 (July 29, 1988), *enforced*, 873 F.2d 552 (2d Cir. 1989); *Tube Craft, Inc.*, 289 N.L.R.B. No. 122 (July 14, 1988); *Valley Kitchens, Inc.*, 287 N.L.R.B. No. 69 (Dec. 16, 1987); *Wallkill Valley Gen. Hosp.*, 288 N.L.R.B. No. 18 (March 23, 1988), *enforced*, 866 F.2d 632 (8th Cir. 1989).

strayed from the Board's own long-standing pronouncements, the Eleventh Circuit reversed the decision and refused enforcement of the Board's order. *Bickerstaff*, 871 F.2d at 985. The court concluded, contrary to the Board, that the cumulative effect of all the evidence presented by the company was sufficient to satisfy the employer's burden of showing a good faith doubt. *Id.* at 994. The Board was criticized for evaluating the factors supporting the good faith doubt claim in isolation and was admonished for rejecting "a composite showing of objective evidence which [was] sufficient to establish, clearly and convincingly, that Bickerstaff had a reasonable basis to support a good faith doubt. . . ." *Id.*[24]

The Board was also specifically criticized for its unrealistic treatment of picket line violence and the resulting impact on an employer's good faith doubt. The Board discounted evidence of extreme picket line violence because the employer was able to "suppress" recurring violence based on a state court injunction. The court disagreed, concluding that there is no requirement that the replacements must have crossed the picket line directly in the face of violence before such evidence may be *probative* of a good faith doubt. *Id.* at 989. "Once a pervasive atmosphere of violence is established in a strike situation, that atmosphere does not vanish as soon as the violence ceases." *Id.* The court thus concluded that the circumstances of picket

24. Other cases have criticized the Board's analysis of facts in isolation rather than considering cumulative effect of all of the evidence. *Thomas Indus. v. NLRB*, 687 F.2d 863, 868 (6th Cir. 1982); *Bellwood General Hosp. v. NLRB*, 627 F.2d 98, 104 (7th Cir. 1980); *Dalewood Rehabilitation Hospital v. NLRB*, 566 F.2d 77, 80 (9th Cir. 1977); *Star Mfg. v. NLRB*, 536 F.2d 1192, 1196 (7th Cir. 1976); *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1036 (8th Cir. 1976).

line violence were indicative of the employer's good faith doubt of continuing majority support.

As the Ninth Circuit recognized in *Mingtree Restaurant, Inc., v. NLRB,* 736 F.2d 1295, 1297 (9th Cir. 1984), the Board now requires evidence sufficient "unequivocally to indicate" that union support has declined to a minority. In that case the court concluded that "[g]iven this strict interpretation of good faith doubt, there is little difference between the evidence necessary to prove a union's minority-in-fact and the employer's reasonable good faith doubt." *Id.; see also Destileria Serrales, Inc. v. NLRB,* 882 F.2d 19, 21 (1st Cir. 1989).[25] This deviation from prior precedents, without accompanying principled explanation for the deviation, makes the Board's decision in this matter arbitrary as a matter of law. *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade,* 412 U.S. 800, 808 (1973) (an administrative agency has a "duty to explain its departure from prior norms"); *Secretary of Agric. v. United States,* 347 U.S. 645, 653-54 (1954); *NLRB v. Metal Container Corp.,* 660 F.2d 1309, 1314 (8th Cir. 1981); 2 K. Davis, *Administrative Law Treatise* § 8:9 at 198 (1979). The Board's adoption

25. Still other courts believe that an employer must demonstrate its good faith doubt by "clear, cogent and convincing evidence." *NLRB v. Tragniew, Inc.,* 470 F.2d 669, 674-675 (9th Cir. 1972); *see Hajoca Corp. v. NLRB,* 872 F.2d at 1174; *St. Agnes Medical Center v. NLRB,* 871 F.2d 137, 145 (D.C. Cir. 1989); *Louisiana-Pacific Corp. v. NLRB,* 858 F.2d 576, 578 (9th Cir. 1988); *Landmark Int'l Trucks, Inc. v. NLRB,* 699 F.2d 815, 819 (6th Cir. 1983); *Orion Corp. v. NLRB,* 515 F.2d 81, 85 (7th Cir. 1975). Despite these observations, the Board continues to adhere to its policy that the quantum of proof necessary under the good faith doubt standard is less than actual proof of loss of majority in fact. In *Bolton-Emerson, Inc.,* 293 N.L.R.B. No. 139 (May 18, 1989) slip op. at 2 n.2, the Board recently rejected any notion that an employer's good faith doubt must be demonstrated by clear, cogent, and convincing evidence.

of the good faith doubt standard as a means for rebutting the presumption of continuing majority support is a proper exercise of administrative discretion, and the Board is bound to adhere to that policy until it is modified or explicitly abandoned. *NLRB v. Campbell Prods. Dep't,* 623 F.2d 876, 881 (3d Cir. 1980). Moreover, counsel for the Board may not now attempt to formulate what the Board's position would have been on these issues had they been addressed by the Board in *Station KKHI* or *CMS.* Guesswork by agency counsel is not an acceptable substitute for agency rationales. *Bowen v. Georgetown Univ. Hosp.,* 109 S. Ct. 468, 473 (1988) ("[w]e have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question"); *SEC v. Chenery Corp.,* 322 U.S. 194, 196 (1947).

Contrary to the Board's practice, the question is not whether a presumption concerning striker replacements is itself sufficient to rebut the overall presumption of continued majority support, but whether the hiring of striker replacements is sufficient to create a reasonably-based *doubt* concerning continued majority support. Properly applied and evaluated, CMS has satisfied the good faith doubt standard in this case.

C. Under Proper Application Of The Test, CMS Demonstrated A Reasonable Good Faith Doubt.

Plainly obvious to the employees and management alike was the fact that the strike was not called to further the interests of CMS's employees. Rather, the strike was called to satisfy, a "personal vendetta" of Business

Representative Howard Reed.[26] J.A. 145 [Tr. 147, Tr. 147]. Consequently, as the ALJ found, the strike was, from the start, unpopular with and unwanted by the unit employees. J.A. 31; *compare* Pet. App. 28a *with* Pet. App. 52a.

The employees expressed their disapproval of the strike and the Union from the beginning. For example, five of the original twenty-seven member work force crossed the picket line on the first day of the strike and thereafter reported to work. J.A. 47, 50, 135. Moreover, Shady Goodson, the Union's Chief Shop Steward and member of the Union negotiating committee, complained to management about the difficulty he encountered in manning the picket line and developing a picket roster. J.A. 29-30, 36-37, 145 [Tr. 142, Tr. 147]. And the number of strikers who served on the picket line dwindled quickly.[27]

The employees' apathy for the strike was exceeded only by the Union's indifference to the strikers. In this regard, other than one piece of correspondence, which was unrelated to the strike or negotiations, the Union made no attempt during the strike to communicate with CMS to resolve what had been from the start, a conspicuously unpopular strike. J.A. 136 [Tr. 7, Tr. 7].

26. The ALJ specifically found that the Chief Shop Steward, Shady Goodson, reported to CMS that "the strike was based on the hostility of the Union's Business Agent, Howard Reed. . . ." Pet. App. 52a & n.7. Reed's betrayal of the employees resulted in crossover employee, Tony Lopez, describing Reed to CMS management as a "rotton S.O.B. that is screwing the employees, taking their money, and doing nothing for us." J.A. 25.

27. This observation was made by CMS Director of Employee Relations, Elizabeth Price, whose testimony and notes the ALJ generally credited. Pet. App. 31a, 49a, 52a n.7. Moreover, strikers admitted to Price that they refused to man the picket line because of dissatisfaction with the Union. Among the strikers who declined to participate in the picketing activities was J. R. Blackshire who had been a Union Steward a year prior to the strike. J.A. 144 [Tr. 142, Tr. 147].

Blackshire and Doucette also criticized the Union's failure to provide support to the strikers. Even the Shop Steward Goodson confessed that the strike efforts were affected adversely because he was having *difficulty getting help from the Union* for the very strike the Union had instigated against the wishes of the unit employees.

And faced with a Union that had called an unnecessary and unwanted strike, and a Union that had failed to support its own members during a critical period, CMS witnessed the inevitable result: the Union's loss of support among unit employees. For example, the Union's leaders (Goodson and Blackshire) volunteered to CMS that they were completely disillusioned with the Union and that the other strikers would not support the Union and did not want the Union to represent them anymore; consequently, the Union had "lost all of their support from the employees in the unit." Moreover, Pete Doucette, Departmental Steward and a member of the Union's negotiating committee, abandoned the strike and requested reinstatement to his former job, and Goodson, eventually resigned. J.A. 15, 147 [Tr. 142, Tr. 145], 154 [Tr. 163, Tr. 163].

Crossover employees, Tony Lopez and Bill Lee, initiated conversations with Price for purposes of voicing their animosity toward the Union. Striker Raymond Brunner tendered his written request for early retirement, stating as the reason his desire to disassociate himself from the Union; J.A. 148 [Tr. 142, Tr. 147], 149 [Tr. 142, Tr. 147]; and striker Robbie Madison flatly resigned. J.A. 155 [Tr. 163, Tr. 163]. Striker Clint Waller confirmed his prior conversations with management by sending letters to CMS and the Union stating "I wish not to be a member of the Teamsters no longer at Curtin Matheson Scientific,

Inc., *or anywhere else*." J.A. 150, 151 [Tr. 150, Tr. 150] (emphasis added).

As for the replacements, they harbored no misconceptions as to the Union's loyalties. To report to work each day, these replacements crossed a hostile picket line, which, of course, did not endear them to the strikers or to the Union. Moreover, they knew that their continued employment was threatened by the Union and its striking members. Replacement Tim Hartman expressed to Price his concern over a rumor circulating among the replacements that they all would be laid off to make room for the strikers. J.A. 165 [99, 100]. And replacement David Schneider informed Price that the Union was not needed at CMS. J.A. 169 [99, 100]. The Union never attempted to contact the replacements, thus confirming the Union's disdain for them. Pet. App. 30a. Neither was there any evidence that the replacements attempted to contact the Union.

The Board responded to the evidence supporting CMS's doubt by counting the heads of those employees who individually came forward to articulate their unequivocal repudiation of the Union (Pet. App. 34a-35a), and trivialized the facts and circumstances that lay before CMS when it formulated its good faith doubt.

In this way, the Board abused its discretion by failing to attribute more credit to the overall anti-union statements made by the employees to their union leaders and the observations made by the union leaders of the declining Union support among the employees.[28] Moreover,

28. Although Blackshire was no longer a steward at the time of the strike, he was "a leader" among the employees. J.A. 48; *see, e.g., Randle-Eastern*, 584 F.2d at 720 ("employer must rely on a Union officer's admission that the Union has lost majority support as objective evidence to support a good faith doubt"); *Lodges 1746 & 743, Int'l*

the Board ignored the *cumulative effect* of statements made by *all of the Union leaders* who, by June 29th either repudiated the Union, abandoned the strike, or both.[29] And the Board completely omitted from its opinion the fact that on June 29th Departmental Steward Pete Doucette abandoned the strike.

To further trivialize the facts as perceived by CMS, the Board gave no weight to the fact that Howard Reed called the strike because of his personal vendetta, or to the five crossover employees who refused to join the strike. Pet. App. 32a-33a. The Board generalized that crossovers may reject the strike purely for economic reasons. *Id.* Combined, however, with the crossovers' refusal to join the strike is the fact that none of the five were members of the Union. J.A. 47. Again, the Board refused to recognize the *cumulative effect* of relevant facts.

Still relying upon generalizations to reach its predetermined result, the Board notes that the Union's indifference to the replacements is "common to the hiring of replacements." Pet. App. 33a. Whether common or not, this factor, when combined with (1) the replacement of all strikers; (2) the Union's July 16th offer to return all of the

Ass'n of Machinists & Aerospace Workers v. NLRB, 416 F.2d 809, 813 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1058 (1970) (admission by one in a position to know the sentiments of employees, may alone be an important factor constituting a reasonable basis for doubting the majority support of the union); *J & J Drainage Prods. Co.*, 269 N.L.R.B. 1163, 1171 (1984) (statement by union steward in relatively small unit, that employees were not interested in union should be accorded greater weight than comments by other employees); *see also Bickerstaff*, 871 F.2d at 987.

29. The Board's response to Blackshire's statement, that the "people" were not supporting the Union, was to categorize it as vague; this response serves only to show how unfairly the Board read the CMS record. The record is replete with references to unit employees as the "people," including testimony by Howard Reed. J.A. 30, 32, 67, 68, 71, 81, 83, 84.

striking employees to their prior positions; (3) the rumors circulating among the replacements of their imminent replacement by the strikers; (4) the hostile picket line; and (5) Howard Reed's betrayal of the unit employees by calling an unwanted strike merely to satisfy his personal vendetta—leads to only one logical conclusion: no replacement would have supported *this Union*.

Given the Board's dogmatic reliance on generalizations to undermine CMS's evidence, it is curious, as well as inconsistent, that the Board would find inappropriate any presumption regarding the replacements' Union sentiments. In this regard, the Board seems to say that blind generalizations are appropriate if application of the generalizations serve the Board's goal; generalizations that defeat the Board's goal, however, are deemed inappropriate, even when supported by compelling evidence, decades of Board and court pronouncements, and plain common sense.

The Board's measurement of the evidence using an improper standard and its failure to consider the cumulative effect of all of the evidence, consequently, is arbitrary as a matter of law. Moreover, the cumulative effect of all of the factors before CMS leads to but one reasonable conclusion: CMS had a reasonably grounded good faith doubt concerning the Union's continued majority status. The Board's decision, which would deny CMS even a *reasonable doubt* concerning the Union's support, therefore, is not supported by the record evidence when considered as a whole.[30]

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30. The Fifth Circuit recognized the insufficiency of the evidence supporting the Board's order and accordingly denied enforcement. Having fairly assessed the record evidence, the Fifth Circuit's denial of the Board's order should be respected. *NLRB v. Pittsburgh S. S. Co.*, 340 U.S. 498, 502-503 (1951); *see also South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Engineers*, 425 U.S. 800, 803-804 & n.5 (1976).

III.

The Board's Fallacious Policy Arguments Undermine Its Plea For Deference

The Board's primary policy argument for its no-presumption rule is that the adoption of the so-called Gorman presumption would:

> disrupt the balance of competing economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative as soon as replacements equal in number to the strikers are willing to cross the picket line.

Station KKHI, Pet. App. 75a-76a.

Contrary to this assertion, the Board's "long established" practice has been to find that an employer may reasonably doubt that replacements support the union. Moreover, the Board's argument ignores the shifting burden, which allows the union to retain its bargaining agency if, in fact, it continues to enjoy majority support, notwithstanding the employer's good faith doubt.

In *Celanese*, the Board adopted the good faith doubt test, including its concomitant lesser quantum of proof, despite contrary arguments for greater emphasis on the policy of promoting the stability of bargaining relationships. The Board explained in *Stoner Rubber Co.*, 123 N.L.R.B. 1440 (1959), that once the employer establishes its good faith doubt, the burden shifts to the union to prove its majority either (i) by invoking the Board's secret-ballot election process, which was characterized as the "most satisfactory" way to determine a union's majority (*Id.* at 1444) or (ii) by coming forward with evidence that the

union *in fact* represents a majority of the employees, which "it should have no difficulty in presenting." *Id.* at 1445.[31]

The Board's doomsday scenario, which posits the loss of the bargaining representative, is unfounded. *Only if replacements in fact oppose the union will the bargaining representative be lost.* Assuming that the union remains the choice of the majority, at worst there will be a delay as the union obtains an election. The delay need not be great for the following reasons: (1) because there has been a previous certification, the parties should be able to proceed directly to an election without first engaging in a representation hearing;[32] (ii) because of the "good faith"

31. The Board reasoned that proof of majority is peculiarly within the competence of the union. 123 N.L.R.B. at 1445. Subsequent to *Stoner Rubber,* however, the Board disavowed adherence to the second prong of the shifting burden doctrine. In *Automated Business Sys.,* 205 N.L.R.B. 532, 535 (1973), the Board stated that the shifting burden rule was inconsistent with *Celanese* and determined that the good faith doubt defense was absolute. The Sixth Circuit overruled the Board's decision concluding that the shifting burden doctrine was the "better rule." *Automated Business Sys. v. NLRB,* 497 F.2d 262, 272 (6th Cir. 1974). The courts of appeals have uniformly adopted the shifting burden rule. *See, e.g., Bickerstaff,* 871 F.2d at 985; *Creative Food Design, Ltd.,* 852 F.2d 1295, 1300 (D.C. Cir. 1989); *NLRB v. Wilder Constr. Co.,* 804 F.2d 1122, 1124 n.1 (9th Cir. 1986); *Landmark Int'l Trucks,* 699 F.2d at 819; *Bellwood Gen. Hosp.,* 627 F.2d at 104; *W&W Steel Co. v. NLRB,* 599 F.2d 934, 939 (10th Cir. 1979); *Nat'l Car Rental,* 594 F.2d at 1205; *NLRB v. Massachusettes Mach. & Stamping, Inc.,* 578 F.2d 15, 19 (1st Cir. 1978); *NLRB v. Windham Community Memorial Hosp.,* 577 F.2d 805, 811 n.11 (2d Cir. 1978); *NLRB v. Great Atl. & Pac. Tea Co.,* 346 F.2d 936, 940 (5th Cir. 1965). Even if the Board continues to refuse to apply the second prong of the shifting burden analysis, the Board election procedure is still available to the Union.

32. A representation hearing resolves the question whether an employer is engaged in commerce and whether the unit sought by the union is an appropriate unit. 29 C.F.R. § 102.63 and 102.67. This process would not be necessary in this case. CMS's Answer herein admitted the jurisdictional facts, which established that it was engaged in commerce, and CMS stipulated at trial that the unit alleged in the complaint was appropriate. J.A. 8, 115 [Tr. 7, Tr. 7]; 122 [Tr. 7, Tr. 7].

factor in the good faith doubt test, there is no atmosphere of unfair labor practices prior to the assertion of the employer's good faith doubt, which might contaminate the laboratory conditions for an election. In the instant case there is no record of unfair labor practices by CMS against this Union or the unit employees, and CMS invited the Union to file an election petition. Moreover, the Union used this procedure successfully in obtaining the original certificate and promptly obtained a contract. Consequently, there is no basis for fear that CMS would act unlawfully or fail to cooperate in expediting the election.

The Board's policy discussion also ignores the relative ease with which the union can deal with its burden once an employer establishes its good faith doubt, and it ignores the inherent difficulties an employer would face in ascertaining its employees' union sentiments under the *Station KKHI* rule. *See* Brief for Petitioner at 23 where the Board argues that the "employer remains free to marshal evidence concerning the replacements' sentiments. . . ."

The Union's burden is light. For example: (1) the union has leadership in the form of trained business representatives, who know the law and procedures available to establish the existence of its majority; (2) employees who assist the union in its efforts are afforded legal protection by Section 8(a)(1) of the Act. 29 U.S.C. § 158(a)(1) (employer may not "interfere with, restrain or coerce employees in the exercise" of their Section 7 rights); (3) the union need only to produce evidence of thirty percent support within the expanded unit in order to obtain an election, *Linden Lumber Co. v. NLRB,* 419 U.S. 301, 309; (4) there are no rules prohibiting the Union from soliciting support from employees, and unions are intimately

familiar with methods by which employees are persuaded to support the union. Indeed, this Union had used such methods effectively at CMS in April 1970 when it obtained its original certification.

In contrast to the union's burden, the employer faces an insurmountable burden in acsertaining its employees' sentiments. For example: (1) according to the Board, an employer may not poll its employees to ascertain their union sympathies unless it can establish the same evidence that is required to withdraw recognition (*i.e.*, objective evidence sufficient to establish a reasonable good faith doubt of the union's majority) *Buckley Broadcasting (Station KKHI II)*, 291 N.L.R.B. No. 130 (Nov. 13, 1988); *Boaz Carpet Yarns*, 280 N.L.R.B. No. 4 (1986); (2) an employer may obtain a Board decertification election only by establishing the same evidence (*i.e.*, a reasonable good faith doubt); therefore, if an employer files a petition for a decertification election based upon the hiring of a new work force of permanent replacements, it is clear that the Board, applying its *Station KKHI* rule would dismiss the petition. Brief for Petitioner at n.1; *NLRB v. Financial Inst. Employees of Am.*, 475 U.S. 192 at 198; (3) if the union files an unfair labor practices charge, it would act as a "blocking charge" to prevent processing of the decertification petition. *Briggs Plumbingware, Inc. v. NLRB*, 877 F.2d 1282, 1290 (6th Cir. 1989); *Automated Business Sys.*, 205 N.L.R.B. 532 at 533 n.6.

Furthermore, under the Board's *CMS* decision, the Union's purported acceptance of the May 25th offer was effective to create a collective bargaining agreement. Pet. App. 36a-38a. Therefore, due to the Board's "contract bar" rule, neither CMS nor its employees could have obtained a Board election until the new contract expired.

NLRB v. Financial Inst. Employees of Am., 475 U.S. 192, 196, n.3 (1986); *Georgia Purchasing, Inc.*, 230 N.L.R.B. 1174 (1977) ("contract bar rule" applied to decertification petition filed by employees).[33]

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33. The Board may argue that CMS should not seek to vindicate the Section 7 rights of its employees. However, because decisions of the Board and of this Court express concern for such rights, it is appropriate for CMS to advance arguments based on such precedent. *Fall River*, 482 U.S. at 2233, 2244; *NLRB v. International Ladies Garment Workers Union*, 366 U.S. 731, 738 (1961); *Terrell Mach. Co.*, 174 N.L.R.B. 1480 (1969), *enforced*, 427 F.2d 1088 (4th Cir. 1970), cited by this Court in *Fall River*, 482 U.S. at 2233, and also cited by the Board in *Station KKHI*, Pet. App. at 61a n.5, was decided at a time when the Board followed its historical treatment of replacements. Thus, at the time *Terrell* was decided the Board and courts were striking the policy balance in favor of protecting unit employees against a minority union, by finding that the employer may doubt that replacements support the union.

CONCLUSION

For each of the foregoing reasons, the judgment of the court of appeals should be affirmed.

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